No. 46702-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Sam and Odallis Groome,

Appellants,

vs.

Alpacas of America, LLC,

Respondent.

APPELLANTS GROOMES' REPLY BRIEF

FORSBERG & UMLAUF, P.S.

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I. INTRODUCTION

The promissory notes that Alpacas of America, LLC, ("AOA") presented are unenforceable, and Appellants, the Groomes, produced competent evidence in support of this defense. Thus, the Groomes raised material issues of fact. The court erred in making factual determinations regarding these contested issues and granting summary judgment to the plaintiff. The court also abused its discretion in first commenting on the need for evidence regarding intent of the parties during the time of non-payment, but then denying a continuance that would have enabled the Groomes to pursue evidence of the same. Finally, the Court erred in failing to correct these mis-steps when presented with a motion for reconsideration.

AOA's arguments against reversal – that the Groomes raise only mantras of credibility and that the contested factual issues are not material – both fail. Instead, the trial court incorrectly denied the Groomes' ability to move forward with discovery and present their defense to a jury. Respectfully, the decisions of the trial court should be reversed.

II. ARGUMENT

The standards for a party bringing a summary judgment are strong by necessity: to bar a party from pursuing discovery and presenting its case denies its access to court. For this reason, the Groomes did not need

to prove their defense by a preponderance to avoid summary judgment. They needed only to produce competent evidence in support of their case. They met this burden of production, and should have been entitled to pursue their defense on the merits.

A. Summary Judgment Standard.

While the function of a summary judgment is to avoid a useless trial, a trial is not useless, but absolutely necessary, where there is a genuine issue as to any material fact. *Jolly v. Fossum*, 59 Wn.2d 20, 24, 365 P.2d 780, 783 (1961); *Bates v. Bowles White & Co.*, 56 Wn.2d 374, 353 P.2d 663 (1960). *See also Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). A question of fact may be determined as matter of law only where reasonable minds could reach but one conclusion. *Ruff v. County of King*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995).

The court's function is not to resolve any existing factual issues, but to determine whether such a genuine issue exists. *Jolly v. Fossum*, 59 Wn.2d 20, 24, 365 P.2d 780, 783 (1961). The Court is not to make findings about the quality of evidence. *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 364, 20 P.3d 921 (2001).

1. **The Groomes produced competent evidence, not mere speculation.**

Sworn statements supporting a disputed fact, even though unsupported by documentary evidence, are sufficient to survive summary judgment and should go to the jury who will evaluate weight and credibility to be given to testimony. *Jolly v. Fossum*, 59 Wn.2d 20, 24, 365 P.2d 780, 783 (1961). Under this standard, Mr. Groomes's sworn statements should have been sent to a jury for consideration, rather than discounted by the trial court because they lacked supporting documents. Similarly, hearsay statements presented through attorney affidavit, which referred to but did not attach transcripts or other documents, are sufficient to create a material issue of fact. *Meadows v. Grant's Auto Brokers*, 71 Wn.2d 874, 431 P.2d 216 (1967). Thus, Mr. Groomes conveyance of statements by the party opponent (through AOA's speaking agent, Mr. Snow), was also sufficient to prevent summary judgment.

Here, the Groomes' met the standard for competent evidence to defeat summary judgment without additional evidence. The contested evidence can be viewed in two sets: first, AOA's Dr. Barnett's declaration in support of summary judgment is directly contradicted by Mr. Groome's declaration in response. Second, Dr. Barnett's reply declaration, which improperly raised new issues of fact which should not have been

considered by the Court,[1] is directly contradicted by Mr. Groome's declaration submitted in support of the motion for reconsideration.

a. Mr. Groome directly contradicted the sworn statements of Dr. Barnett.

Dr. Barnett's first declaration, submitted in support of the motion for summary judgment, included the following four assertions. First, both subject alpacas have warranty of fertility, and according to "statements made by Groomes to Alpaca Registry, Inc." they have given birth to live cria. CP 19, ¶ 10. Second, December, 2008 was the first time the Groomes had notified AOA of Black Thunders Midnight ("BTM")'s failure to conceive. CP 20, ¶15. Third, Mr. Groome had sought warranty service multiple times. CP 50-51. Finally, one of the subject cria, Black Thunder's Midnight, ("BTM") had birthed a cria because the Groomes attempted to register one. CP 20, ¶15.

Mr. Groome countered these factual assertions in his responsive declaration. First, he believed Randy Snow was owner of AOA, and did not know Dr. Barnett existed before the lawsuit was filed. CP 138-39. In 2007, AOA substantially changed how it addressed warranty issues.

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1 "First, allowing the moving party to raise new issues in rebuttal materials generally gives the moving party no opportunity to respond." *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). Second, nothing in CR 56(c) allows the raising of additional issues other than in the motion and memorandum in support of the motion. *R.D. Merrill Co. v. State Pollution Control Hearings Bd.*, 137 Wn.2d 118, 147, 969 P.2d 458, 473 (1999).

Instead of honoring the warranty issues as it had always done, AOA delayed warranty service until it completely refused to live up to warranty obligations. CP 141, ¶7. Mr. Groome attempted contact with Mr. Snow by telephone beginning March, 2007, to address issues with fertility of alpacas purchased from AOA. CP 140-41, ¶5. Failing to receive a response for months, Mr. Groome wrote a letter to AOA regarding the fertility issues. CP 140-41, ¶5. Mr. Snow finally called Mr. Groome and assured him that AOA would first address fertility issues with one alpaca, then turn to the fertility issues of the subject alpaca, BTM. CP 141, ¶5. The Groomes stopped paying AOA as a way of forcing AOA to deal with its warranty obligations. CP 141, ¶5. AOA continued to fail to meet its warranty obligations. CP 142. Mr. Groome even travelled across the county to AOA's property to discuss warranty issues with Mr. Snow, only to arrive to a nearly abandoned property and to discover Mr. Snow no longer worked there. CP 142 ¶9. And finally, the attempt to register a cria to BTM was a mistake because the cria was, in fact, the offspring of another dam. CP 143 ¶13.

This evidence is both material to the dispute between the parties and directly contradictory. Dr. Barnett asserts that Mr. Groome did not complain of warranty issues until 2008, whereas Mr. Groome states that he proactively sought remedy of warranty issues from AOA's agent and

frontman, Randy Snow, from March of 2007 onward. Dr. Barnett asserted that BTM had a cria. Mr. Groome stated that BTM had no cria. It is not possible to accept the assertions of one of these declarations without discounting the assertions from another.[2] As demonstrated in the Groomes' Opening Brief, the trial court's comments reveal the weighing and discounting of evidence necessary to make a factual determination from these conflicting facts. Opening Brief, pp. 5-6. The disputed evidence required denial of summary judgment.

b. Mr. Groome directly contradicted the improper new allegations asserted by Dr. Barnett in AOA's Reply.

Dr. Barnett asserted new factual issues in his declaration in support of AOA's reply on summary judgment. The declaration claimed the real reason the Groomes withheld payment was their pending divorce. CP 169. The assertion is inconsistent with Dr. Barnett's own attached exhibit, the AOA bill collection ledger. The ledger records divorce as a reason for non-payment only after December of 2008. CP 153. Thus, divorce as an excuse came only after notice of warranty issues that Dr. Barnett admits occurred in December 2008. Dr. Barnett also commented on the quality of

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[2] Moreover, Mr. Groome – unlike Dr. Barnett – made his statements based on the personal knowledge he had developed from experiencing these issues himself, and from possessing the subject alpacas. In contrast, Dr. Barnett was largely uninvolved with AOA until Mr. Snow's departure in 2009-10. *See* CP 52-130. At the very least, Mr. Groome demonstrated a disputed factual issue.

evidence submitted by the Groomes, noting it was "curious" that no documentation regarding contested fertility issues were produced.[3] CP 171. Notably, Dr. Barnett did not contest that AOA refused to provide warranty service in 2007/2008 for BTM. CP 168-171.

Mr. Groome responded by reasserting AOA's failure to comply with warranty service it promised by contract. AOA did not comply with requirements for warranty service for Dark Seeqret until Mr. Groome obtained veterinary records from Cornell documenting efforts to breed her – a burden of proof AOA had never previously required. CP 206-07 ¶4. Mr. Groome reiterated that he attempted multiple times to contact Mr. Snow regarding warranty issues from 2007-2009, including a visit to the AOA ranch in 2009, and that fertility issues (rather than his divorce[4]) were the reason for non-payment. CP 207-08. Responding to Dr. Barnett's comments on the lack of documents, Mr. Groome noted that his business office had been burglarized and vandalized. He could not produce records because they had been destroyed. CP 209 ¶6.

Material facts are in dispute. Dr. Barnett asserted a divorce, and not warranty issues, was the reason for non-payment. Mr. Groome

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[3] Dr. Barnett's comment on the evidence in his declaration is the very type of attack on credibility which is not considered sufficient to make an issue of fact from otherwise uncontested evidence. *Building Industry Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 735-36, 218 P.3d 196 (2009).

[4] Although AOA contends the divorce was "nasty", the Groomes were and remain amicable.

asserted that warranty issues were the reason for non-payment, and that he had reached out to AOA through Mr. Snow multiple times to address these issues. On reconsideration, the Court again considered the weight and credibility of the evidence (*i.e.*, documentary evidence versus sworn statements) before making factual findings. RP, Sept. 12, 20-21. This was improper on summary judgment and constitutes an error by the trial court.

c. AOA's use of *Howell* is misguided.

The Groomes address AOA's reliance on *Howell* in light of its repeated use of the quote addressing "incantations of credibility." Despite the tempting language, it is easily distinguished from this case. In *Howell*, the plaintiff contracted HIV/AIDs from a blood transfusion, and alleged the wrongful donation of blood by an HIV-positive man. The defendant produced sworn statements, which were "completely uncontradicted," that at the time of donation he was not part of a "high risk group" and that he had no symptoms of HIV/AIDS, and therefore was not on notice that he should not donate blood. In affirming summary judgment for the defendant, the court noted:

> Howell has presented absolutely no evidence that John Doe X knew or should have known of his seropositivity when he donated blood in 1984. The only evidence offered on this issue is from John Doe X himself ... This evidence went completely uncontradicted by Howell and, in fact,

> Howell's counsel conceded at oral argument Howell's inability to prove John Doe X's knowledge of his seropositivity at the time of the blood donation.

Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 625-26, 818 P.2d 1056, 1059 (1991).

It was only after making these comments that the court noted that the opposing party "must be able to point to some facts...[that] refute the proof of the moving party in some material portion, and that the moving party may not merely recite the incantation 'Credibility' and have a trial on the hope that a jury may disbelieve factually uncontested proof." *Howell*, 117 Wn.2d at 627. Here, the Groomes pointed to facts. They did not merely attack the credibility of Dr. Barnett. They brought forward particular sworn statements, a letter, call logs, and other documents evidencing the multiple attempts by Mr. Groome to access AOA's warranty service. AOA's evidence is contested. *Howell* is not on point.

B. <u>The Groomes Presented Factual Issues Which Were Material</u>.

Implicitly agreeing that disputed issues of fact exist, AOA next argues that the disputed facts should be ignored because they are immaterial. AOA is incorrect. A material fact is one upon which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

The Groomes have asserted a defense pursuant to RCW 62A.3-305,[5] which states in pertinent part:

> "the right to enforce the obligation of a party to pay an instrument is subject to the following... (2) A defense of the obligor stated in another section of this Article or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract."

RCW 62A.3-305. The Groomes have argued breach of warranty and breach of obligation due to AOA's failure to (1) provide fertile alpacas, and (2) comply with its warranty service provision, which requires that the allegedly infertile alpaca be returned to AOA for a final chance at breeding before the alpaca is either returned or replaced. CP 23. If AOA did breach one or both of these obligations, then the Groomes are entitled to suspend their own payment obligations under the contract. AOA admits as much. *See* Brief of Respondent, p. 20; RCW 62A.2-610. Thus, because the Groomes had a defense against payment under the simple contract, they also have a defense against the enforceability of the notes.

The contested evidence– whether or not Mr. Groome intended[6] to breach his duty to pay in light of AOA's failure to meet its warranty

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[5] AOA repeatedly attempts to minimize the Groomes' defense as one of "off-set." The record clearly demonstrates that the preserved defense is enforceability, not merely off-set. *E.g.*, RP, Aug. 15, 2014, 7:25-8:4.

obligations, and whether the alpacas were infertile – is material to this defense. If AOA did not live up to its warranty conditions, then it is not entitled to enforce the notes. The statements to Mr. Snow and from Mr. Snow are not irrelevant promises outside the scope of the warranty, as AOA argues. They are statements by an agent[7] regarding the duty to perform the warranty, and those statements are probative to the defense. The contested issues were material.

C. The Groomes Made Sufficient Showing To Be Entitled to a CR 56(f) Continuance.

Civil Rule 56(f) allows the court to order a continuance for further discovery when "it appear[s] from the affidavits of a party opposing the [summary judgment] motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition. *MRC Receivables Corp. v. Zion*, 152 Wn. App. 625, 628-29, 218 P.3d 621, 622 (2009).

The Groomes have already shown that material issues of fact existed, particularly relating to communications made by Mr. Groome regarding warranty issues. However, even if the Groomes had not brought sufficient evidence to prevent summary judgment, they were entitled to a

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[6] AOA cites *Richard v. Gamel*, 5 Wn. App. 549, 489 P.2d 366 (1971) as holding that the Groomes were required to prove infertility before they withheld payment. In fact, this case addresses implied warranties of UCC Article 2 goods. As discussed by AOA, Article 2 is not applicable to these notes.

[7] Knowledge of an agent will generally be imputed to his principal. *Sparkman and McLean Income Fund v. Wald*, 10 Wn. App. 765, 520 P.2d 173 (1974).

continuance to pursue the emails that AOA withheld in discovery, and that the Groomes demonstrated were likely to contain valuable information regarding their defense.

The Groomes offered the following representations: that the communications by AOA's agent were relevant to establishing the disputed warranty issues. CP 53-54. Mr. Snow emailed Dr. Barnett extensively regarding collection efforts and client relations in 2009-10, after Mr. Snow began the process of retiring. CP 53-54. Thus, it was reasonable to expect similar communications demonstrating intimate involvement with Mr. Groome from Mr. Snow's period of active employment. CP 53-54. Finally, the Groomes asked in discovery for the emails relevant to their account and AOA had refused to produce them. CP 52, 61-62. The Groomes' inability to obtain these emails prior to summary judgment resulted from AOA's inadequate discovery responses.

The trial court's oral ruling demonstrates its abuse of discretion: the court commented on the fact that the emails would be relevant to mental intent and state of mind before it denied the continuance. Opening Brief, p. 6; CP 300-01. By making this comment, the Court acknowledged the materiality of those emails to the motion. One cannot simultaneously hold that evidence on intent is irrelevant and unneeded while also ruling that a breach of warranty defense is not viable because notice of why

payment was being withheld was not established. The continuance should have been granted so that the Groomes could obtain this valuable and probative evidence.

D. While the Groomes Do Not Believe That AOA Will Prevail, They Do Not Contest the Fees Provision on the Note.

As in the trial court, the Groomes do not contest the plain language of the fees provisions on the notes. Rather, they consider the notes to be unenforceable. Should the Court rule against them, the Groomes agree AOA would be entitled to fees, although they reserve the right to contest the amount of fees awarded.

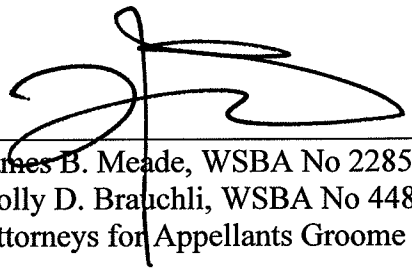
III. CONCLUSION

The Groomes presented competent evidence, in the form of sworn statements and supporting documents, to create material issues of fact regarding the unenforceability of the notes at issue because AOA breached its obligations. Additionally, the Groomes made an offer of proof as to why a CR 56(f) continuance should be granted so that they could pursue additional, specific evidence to support their defenses. Summary judgment should have been denied or a CR 56(f) continuance should have been granted. Instead, the Court improperly weighed the conflicting evidence and made findings of fact before entering judgment. Respectfully, the trial court erred and should be reversed.

The court also erred in denying the Groomes' motion for reconsideration of these issues, particularly in light of the new evidence submitted to counter the improper Reply declaration offered by AOA in summary judgment. The Groomes respectfully request reversal of the trial court's three rulings granting summary judgment, denying their CR 56(f) request, and denying their motion for reconsideration.

Dated this 27th day of March, 2015.

Respectfully submitted,



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DECLARATION OF MAILING

On this day I placed in the U.S. mail a true and accurate copy of the **Appellants Groomes' Reply Brief** to the following:

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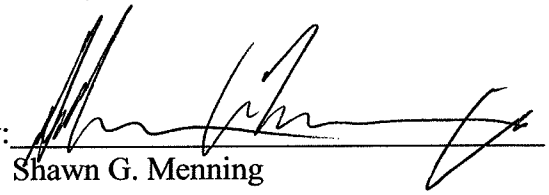
By: 
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Appellants Groomes' Reply Brief

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